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IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1945.

No. 552

THE OFFICIAL AVIATION GUIDE COMPANY, INC.,
Petitioner,
vs.

AMERICAN AVIATION ASSOCIATES, INC., WAYNE
W. PARRISH, H. D. WHITNEY AND THOMAS E.
LINDSEY,
Respondents.

**PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.**

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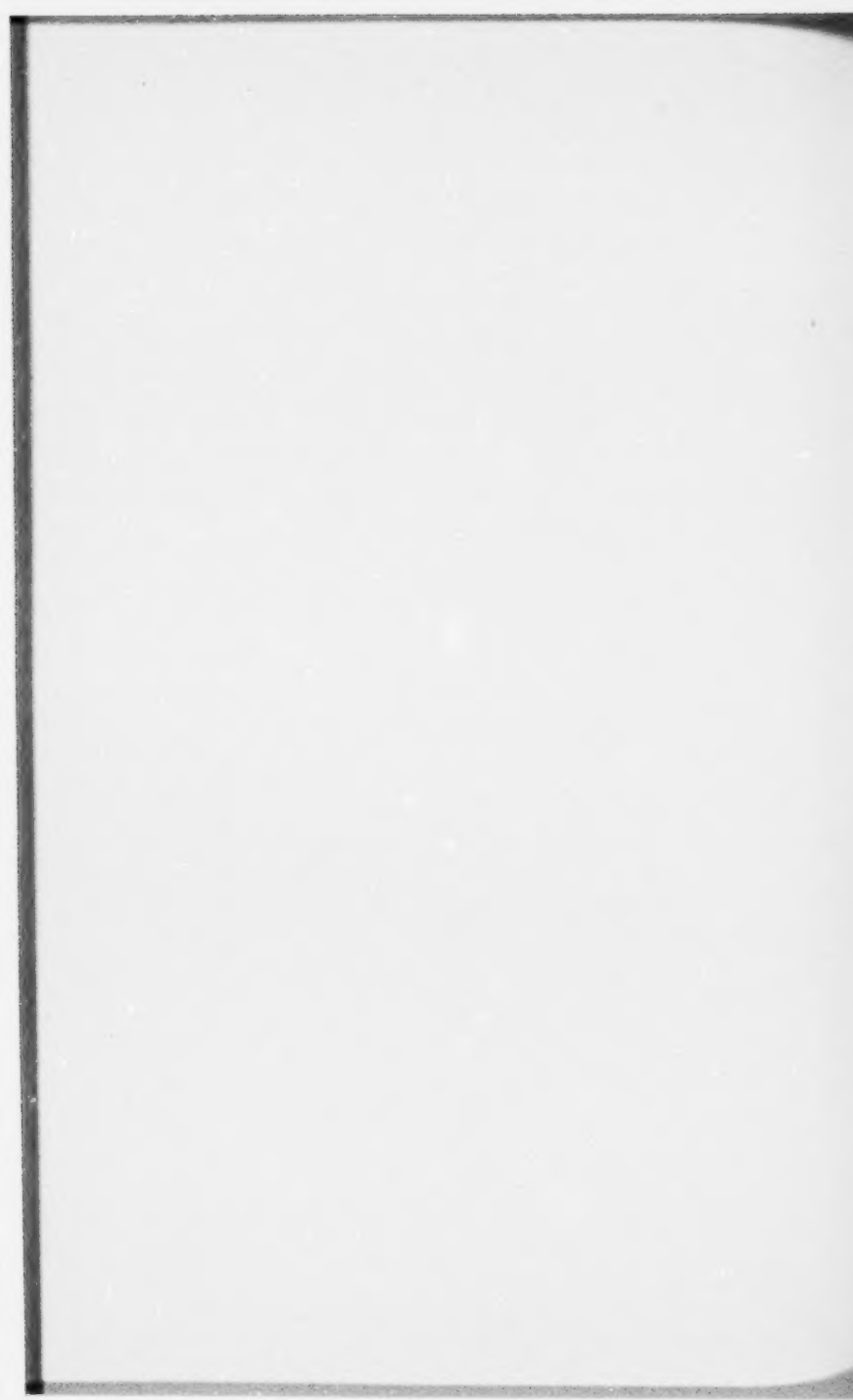


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STATUTE CITED.

Judicial Code, Section 240, as amended by Act of Congress February 13, 1925, 43 Stat. 938; U.S.P.C.A., Title 28, Section 347 (a)..... 2

IN THE

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No.

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Petitioner,
vs.

AMERICAN AVIATION ASSOCIATES, INC., WAYNE
W. PARRISH, H. D. WHITNEY AND THOMAS E.
LINDSEY,
Respondents.

**PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner, Official Aviation Guide Company, Inc.,
prays that a writ of certiorari issue to review the decision
of the United States Court of Appeals for the Seventh Cir-
cuit, entered herein June 15, 1945 (R. 623), reported at
65 U. S. P. Q. 553.

Petition for rehearing was duly presented (R. 633) and
denied August 9, 1945 (R. 654).

A certified transcript of the record, including the proceedings in the Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

I.

Jurisdiction.

(a) Federal jurisdiction of the courts below existed under the Copyright Laws of the United States.

(b) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of Congress February 13, 1925, 43 Stat. 938; U. S. P. C. A., Title 28, Section 347 (a).

II.

Questions Presented.

The main questions, which involve the copyright laws and decisions applicable are:

1. Whether a duly issued copyright on a monthly publication, as a whole, protects the copyrightable component parts thereof, as provided in Section 3 of the Copyright Act, or merely the publication *as a whole*, and, therefore, whether the Court of Appeals was correct in denying all protection under petitioner's copyrights because it concluded that the accused publication, *as a whole*, was not identical with the copyrighted publication in sequence and arrangement, and therefore, not similar enough *as a whole*, to constitute infringement, notwithstanding various of the component parts are substantially identical.

2. Whether the well established rule of copyright law that a copy, sufficient to constitute infringement, is one which ordinary observation would cause to be recognized as being taken from the original (*Daly v. Palmer*, 6 Blatch.

270; *King Features Syndicate v. Fleischer, et al.*, 299 Fed. 533 (C. C. A. 2); *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1; *Encyclopedia Britannica v. American Newspaper Association, et al.*, 130 Fed. 460 (C. C. N. J.), aff'd 134 Fed. 831 (C. C. A. 2) should be disregarded, as was done by the Court of Appeals.

3. Whether the Court of Appeals was correct in disregarding the decisions of this and other courts which hold that a copy, in order to be an infringement, need not be identical in sequence, arrangement, or otherwise (*Callaghan v. Myers*, 128 U. S. 617, at page 661; *Ansehl v. Puritan Pharmaceutical Co., et al.*, 61 F. (2nd) 131 (C. C. A. 8), at page 138, and cases there cited; *King Features Syndicate v. Fleischer*, 299 Fed. 533 (C. C. A. 2), at page 535, and cases there cited; *Lawrence v. Dana*, Fed. Case No. 8,136, 4 Cliff. 80).

4. Whether the rule of this court (*Adamson v. Gilliland*, 242 U. S. 350; Rule 52(a), Rules of Civil Procedure) that the findings of fact of the District Court, who heard and saw all witnesses in open court on the question of copying and similarity, and whose findings are amply supported by the uncontradicted evidence, should be adopted and followed, or disregarded, as was done by the Court of Appeals in the present case.

5. Whether Section 41 of the Copyright Act, to the effect that a copyright is distinct from the property and the material object copyrighted and that the sale or conveyance by gift or otherwise of the material object of itself does not constitute a transfer of the copyright, should be disregarded, as was done by the Court of Appeals.

6. Assuming the airlines may have furnished petitioner with the information and facts depicted in the listing sections (one of the component parts), and paid a listing fee, whether that gives them any right or title to the

copyright as a whole or to petitioner's *style, garb and expression* of its original component parts, or puts the airlines or any of them in position to give legal immunity to an otherwise infringing *competing publisher*, in view of: *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 274 Fed. 932 at 934 (Circuit Judge Learned Hand), *aff'd* 281 Fed. 83 (C. C. A. 2); *Houghton Mifflin Co. v. Stackpole Sons, Inc., et al.*, 104 F. (2d) 306 (C. C. A. 2); *Triangle Publications v. New England Newspaper Pub. Co.*, 46 F. Supp. 198 (D. C. Mass.); *R. R. Donnelly and Sons Co. v. Haber, et al.*, 43 F. Supp. 456 (D. C. N. Y., Judge Campbell); *Hoague-Sprague Corporation v. Frank C. Meyer*, 31 F. (2d) 583; *Deward & Rich v. Bristol Savings & Loan Corp.*, 29 F. Supp. 777 (D. C. Va.); Weil on Copyrights, 1917 Edition, page 207, Section 542; *Anschl v. Puritan Pharmaceutical Co.*, 61 F. (2d) 131 (C. C. A. 8).

7. Whether petitioner should be denied all relief under its copyright, as to all or any part thereof, merely because some of the subscribers (the airlines) furnished most of the facts depicted in the listing section, and paid a nominal listing fee.

8. Whether the Court of Appeals can properly disregard the Copyright Act and the well established decisions of this and other courts and the controlling facts in the case, and by so doing, deny the copyright owner all relief.

9. Whether the copyright owner should be denied all relief, where copying is found and admitted and the accused publication, save for the outside cover, would obviously be recognized as being taken from the copyrighted publication, including the component parts thereof, when there is no proof that either the publication as a whole or the copyrightable component parts asserted were in the public domain.

III.

Summary and Short Statement of the Matters Involved.

Continuously, since early 1929, petitioner has prepared and issued new editions monthly of a publication known as the "Official Guide of the Airways." This has been its sole business from the outset. Each edition was duly copyrighted. The copyrights asserted as being sufficient for this case are for the December 1942, January, February, March and April 1943 editions. It is admitted (a) that the petitioner obtained copyrights for each edition commencing in 1929 (R. 51); (b) that petitioner is the valid owner of copyrights thereon (R. 52); (c) that petitioner published its first edition in February 1929 (R. 108); (d) that it has continuously since put out a "new edition each month" (R. 353); and that the first edition of respondents' accused publication was published in April 1943 (R. 108). Petitioner has reserved to itself all rights under its copyrights.

Petitioner's copyrighted publication is devoted primarily to master airline charts and layouts depicting and clothing in petitioner's original style, garb and *expression*, information relating to air travel, airmail and air express of paramount importance to actual and prospective users of air transport and to the industry generally (R. 353-354). Petitioner was a pioneer in this field in 1929 (R. 354).

Aside from the complete publication being original and new as a whole, it embodies several copyrightable component parts, such as the *master airline charts, contents section, layout and listing sections clothing the desired information and facts in petitioner's own expression, style and garb*, all conceived and originated by petitioner at its own expense, for its own use, as an inherent part of its publication (R. 64, 67, 68, 355-356, 360, 393, 394).

Sometime after establishing the publication, most of the airlines, at petitioner's suggestion, paid a nominal listing fee (R. 357), and for each new monthly edition thereafter generally furnished petitioner with current changes or corrections as to facts pertaining to their respective lines, by noting them on petitioner's page layouts or tearsheets, containing petitioner's *expression, style and garb*, submitted by petitioner for that express purpose (R. 360, 437).

Several years after the publication had been on the market, petitioner accepted from the airlines a very limited amount of promotional display sections which never formed but a relatively small part of the whole publication. However, as the airlines prepared and furnished the copy for these promotional display sections, as published, they were not relied on by petitioner in the courts below, as a copy-rightable component part of its publication and are not relied on here.

Samples of petitioner's copyrighted publication "Official Guide of the Airways", and respondents' accused publication entitled "Universal Airline Schedules" are, we understand, being filed with this court as Petitioner's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10 (offered R. 353-354), and Petitioner's Exhibits 25 and 26 (offered R. 396).

Before starting any business in connection with the accused publication, the respondents employed Chase, petitioner's *ex alter ego*, (R. 363, 532) to prepare, manage and direct such a publication. Long before respondents had prepared anything or any part of their publication, they sent to several different printers a copy of petitioner's genuine publication, including the charts, for the purpose of obtaining estimates of the cost of printing (R. 363-364). The estimates for printing were based, not on respondents' yet unprepared copy, but on petitioner's genuine publication (Pl. Exh. 17 and 18, R. 466, 582).

Before respondents prepared any part of their infringing publication, they prepared and mailed to the industry a brochure (Pl. Exh. 11, R. 364, 365, 467, 541, 583) setting forth specifications undoubtedly based on petitioner's publication, as it reads exactly thereon, and at that time respondents' publication was yet to be prepared. In that brochure respondents featured the fact that Chase was formerly in charge of petitioner's copyrighted publication.

Respondents repeatedly attempted to buy petitioner's publication and copyrights, and threatened that if it did not sell on respondents' terms, they would drive petitioner out of business (R. 349, 410-411, 414-419).

Before receiving any material or any data of any kind from the airlines, respondents' employees proceeded to prepare the accused publication, and in doing so, had before them several copies of petitioner's copyrighted publication. In preparing copy for the printer, they admittedly copied page after page from petitioner's copyrighted publication (R. 365, 367, 523, 583).

Before respondents received anything from the airlines or any request to publish anything for them, their president had definitely decided on the expression, form, style and garb of the proposed publication charged to infringe, at which time he had several copies of petitioner's copyrighted publication before him, and the infringing copy shows that he did follow petitioner's publication as his model (Pl. Exh. 11, R. 541-542).

Aside from the name and the outside of the cover, the two publications are substantially identical in the main, and particularly as to the copyrightable component parts asserted below and here. The master chart appearing on the inside of the front cover of petitioner's March 1943 issue and respondents' master chart appearing on the inside of the back cover, particularly the issue for August

1943, prove beyond a doubt that petitioner's was the model for respondents'. The style, garb, expression, arrangement and combination as a whole is the same. No master chart or publication like petitioner's is shown to be in the public domain. No such contention is or can be made. The *expression, style* and *garb* of the contents and listing sections of both publications are substantially identical, as are the maps of Central and South America. A look at one and then the other will so demonstrate.

The District Court (Judge Campbell) who saw and heard all the witnesses in open court on the matter of copying and similarity, after several days' trial, and after extensive briefs, rendered a written opinion in favor of petitioner, holding the copyrights valid and infringed, (R. 568) and later entered detail findings on all the pertinent facts consistent with the opinion (R. 578).

The appellate court did not hold the copyrights invalid but, by completely disregarding Judge Campbell's findings of fact *which were fully supported by the evidence*, denied petitioner relief not only on the publication as a whole, but as to all the copyrightable component parts.

After making a *sequence* comparison as to the *position* of the different component parts in the two publications (R. 626), the Appellate Court said (R. 626):

"From *this comparison*, it is apparent that although much of the information carried by the two magazines is the same, the sequence and arrangement thereof are not identical. Nor are they similar enough to warrant the charge of infringement." (Italics ours.)

This "*comparison*" mentioned by the Court of Appeals and on which it concluded there was no infringement, immediately precedes such conclusion (R. 626). In making this sequence comparison, the Court of Appeals said (R. 626): "Comparing the March Guide and the April Sched-

ules as to *sequence* and arrangement, we find the following:" (italics ours). It then sets up two columns, one entitled "Guide", and the other entitled "Schedules". In each it lists twenty items. Under the column "Guide", it lists as Item 1, "United States Map". This is the large master airline fold-out chart appearing on the *inside* of the *front* cover of petitioner's publication. As Item 1 under "Schedules", it lists "Publication and Services of American Aviation Associates, Inc.", instead of listing the fold-out United States master airline chart which appears on the *inside* of the *back* cover of respondents' publication. At no place in that comparison does the Court of Appeals compare or refer to the fact that in petitioner's the master airline chart is on the inside of the *front* cover, while in respondents', substantially the same master airline chart, having substantially the same expression, style and garb, is on the inside of the *back* cover. Apparently the Court of Appeals thought that if the respondents transposed the position of this map to some other part of the book, rather than having it on the inside of the *front* cover, then there was no infringement. It is elementary that infringement of a component part is not avoided because the defendant places it in a different position or spot in its publication or by changes in "*sequence*". This "*sequence*" comparison of Item 1 by the Court of Appeals may be taken as typically illustrative of most of the other nineteen items which it mentions in its "*sequence*" comparison. To make such a comparison to show that the "*sequence*" is different, that is, the component parts are differently positioned, is obviously under the law, of no help or interest in determining the question of infringement, because the copyright law *covers each and every copyrightable component part to the same extent as if each was separately copyrighted*. The copyright owner is entitled to protection, regardless of transposition or changes in "*sequence*". This rule is so well established

that the citation of authorities seems quite unnecessary here.

It is thus clear that the Appellate Court denied all relief upon the publication broadly, because the *sequence* and *arrangement*, as a whole book, were not identical or similar enough. Thus it denied all relief on the component parts notwithstanding respondents' corresponding component parts are, as the District Court found (R. 570, 584, 585), substantially the same in expression, style and garb (see Pl. Exh. 3, Petitioner's March 1943 issue, and Pl. Exhs. 25 and 26, Respondents' issues). In doing so it *necessarily disregarded the Copyright Act* (Section 3) *which provides for protection on each and all component parts.*

IV.

Reasons for Granting the Writ.

1. The decision of Judge Kerner, in the Court of Appeals, is in direct conflict with and contrary to the Copyright Act and the uniform decisions of this and other United States courts.
2. It arbitrarily denies copyright protection on petitioner's publication, not only as a whole, but on the component parts thereof because the sequence, and position of the parts "are not identical," and "not similar enough to warrant the charge of infringement" (R. 626).
3. It also denies petitioner relief on its publication as a whole and the copyrightable component parts thereof because certain airlines furnished information and facts depicted in certain component parts, namely, the listing sections and paid a listing fee, notwithstanding the evidence

clearly shows that the layout, expression, style, garb and arrangement of the listing sections was conceived, originated and prepared by petitioner itself, at its own time and expense, as an inherent part of its publication without any request or contribution from the airlines, long before receiving any material from those airlines.

4. On the question of infringement, it disregards the rule in this and other courts that if ordinary observation would cause the accused copy to be recognized as being taken from petitioner's, then it is sufficiently similar to make out infringement.

5. It disregards the Copyright Act, Section 3, which provides that under a copyright on a publication *as a whole*, the owner is entitled to such copyright protection on each and all of the component parts thereof, as he would have if each part were individually copyrighted.

6. One phase of Judge Kerner's decision, by way of *dictum*, apparently held that because an airline paid a nominal listing fee and supplied facts and information regarding its line to petitioner, which information and facts petitioner clothed in its own *previously* established layout, expression, style and garb, it could give immunity to a competing publication, as a whole, thus creating and applying, for the first time, a new legal bar to the grant of protection under a copyrighted publication and its component parts, a question of great general importance, which should be settled by this court.

7. It decided an important federal question in direct conflict with the facts in this record and the applicable decisions of this and other courts.

8. It decided a question of great general importance and a question of substance relating to the Statutes of the United States contrary to and without giving proper effect to applicable decisions of this and other courts.

9. The decision of the Court of Appeals departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

10. The decision of the Court of Appeals has not given proper effect to applicable decisions of this and other courts.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directing the United States Court of Appeals for the Seventh Circuit to certify and send to this court for determination, on a day certain to be therein named, a complete transcript of the record and all proceedings in the case, to the end that the said judgment in the Court of Appeals be reviewed and determined by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CLARENCE J. LOFTUS,

JOHN M. MASON,

Counsel for Petitioner.

October 20, 1945.

